

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In re |) | |
| |) | |
| TELEPHONE & TWO-WAY INC. |) | File No. EB-02-IH-0893 |
| |) | NAL/Acct. No. 200332080007 |
| Applicant for Wireless Telecommunications |) | FRN 0002931608 |
| Bureau Radio Service Authorization |) | |
| |) | |

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 26, 2002

Released: December 27, 2002

By the Chief, Investigations and Hearings Division, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that Telephone & Two-Way Inc. ("TTW") failed to timely file two of its three "long-form" applications (FCC Form 601s) following completion of the Commission's Lower and Upper Paging Bands Auction ("Auction No. 40"), in apparent willful and repeated violation of Section 1.2107(c) of the Commission's rules.¹ We conclude that TTW is apparently liable for a forfeiture in the amount of \$3,000.

II. BACKGROUND

2. On December 5, 2001, Commission staff completed the auction of 15,514 licenses in Auction No. 40. TTW was among the participants in that auction. On December 11, 2001, the Wireless Telecommunications Bureau issued a Public Notice that provided detailed information concerning specific post-auction obligations of winning bidders.² The Public Notice established December 27, 2001, as the deadline for winning applicants to submit their long-form applications. The Public Notice also announced that TTW was a winning bidder in Auction No. 40.³

3. After the Commission's receipt and initial review of the Auction No. 40 long-form applications, Commission staff noticed that TTW had failed to file two of its three long-form applications. Commission staff subsequently contacted TTW's representative. Thereafter, on January 10, 2002, TTW submitted a Waiver Request and electronically filed its long-form applications. In its Waiver Request,

¹ 47 C.F.R. § 1.2107(c).

² "Lower and Upper Paging Bands Auction Closes: Winning Bidders Announced," *Public Notice*, 16 FCC Rcd 21821 (2001) ("*Closing PN*").

³ *Id.* at Attachment A.

TTW explained that it missed the long-form filing deadline due to inadvertence.⁴ TTW states that it did not realize that a separate long-form application was required for each distinct paging radio service code and therefore it only filed one long-form application.⁵ TTW further claims that it was confused by the instructions listed on the Public Notice.⁶

III. DISCUSSION

4. Section 1.2107(c) of the Commission's rules provides that:

A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder.⁷

This section further provides that long-form applications must be filed electronically.⁸

5. The purpose of the long-form applications is to provide vital information concerning winning bidders and their qualifications to be Commission licensees. Public notice of acceptance of a winning bidder's long-form applications triggers the establishment of the pleading cycle for petitions to deny.⁹ The timely filing of these long-form applications is thus essential to the efficiency of the competitive bidding licensing process.

6. On April 9, 2001, Commission staff first released a Public Notice announcing the upcoming Lower and Upper Paging Bands Auction.¹⁰ Therein, auction participants were informed of their post-auction filing obligations in the event they were winning bidders. Thus, TTW was on notice even before the auction commenced that, if it were a winning bidder, it would have to electronically submit a properly completed long-form application within ten business days after release of the auction closing notice. In addition, on December 11, 2001, Commission staff issued a post-auction Public Notice establishing December 27, 2001, as the filing deadline and describing in detail the long-form application filing requirements. That Public Notice expressly stated: "Note: For Auction 40, you must file a separate

⁴ See TTW's Waiver Request, FCC File Nos. 0000729806, 0000729833 (dated Jan. 10, 2001) ("Waiver Request"). The Wireless Telecommunications Bureau subsequently granted the Waiver Request. See *In the Matters of City Page & Cellular Services, Inc. d/b/a City Beepers, et al.*, *Order*, DA 02-3558 (Policy and Rules Branch, CWD, rel. Dec. 23, 2002).

⁵ See Waiver Request at 2.

⁶ Waiver Request at 2.

⁷ 47 C.F.R. § 1.2107(c).

⁸ *Id.*

⁹ See 47 C.F.R. § 1.2108(b).

¹⁰ See "Lower and Upper Paging Bands Auction Scheduled for June 26, 2001; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedural Issues," *Public Notice*, 16 FCC Rcd 7657 (2001).

application for each distinct radio service code for which you have won markets.”¹¹ Nevertheless, TTW failed to file two of its three long-form applications on time. In light of these facts, we conclude that TTW

failed to file all of its long-form applications by the established and well publicized deadline, in willful and repeated violation of Section 1.2107(c) of the Commission’s rules.¹²

7. Section 503(b)(1)(B) of the Communications Act of 1934, as amended, provides that any person who willfully or repeatedly fails to comply with the Act or the Commission’s rules shall be liable for a forfeiture penalty.¹³ The guidelines contained in the Commission’s *Forfeiture Policy Statement* specify a base forfeiture amount of \$3,000 for failure to file required information.¹⁴ The guidelines also permit the Commission to issue a higher or lower forfeiture amount based on such factors as the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, history of any prior offenses, ability to pay, and such other matters as justice may require. TTW does not dispute that it failed to timely file all of the necessary forms. We believe a forfeiture is appropriate in this case, and see no basis for departing from the base forfeiture amount. Thus, we propose a forfeiture in the amount of \$3,000. This amount is consistent with other cases involving similar transgressions.¹⁵

IV. ORDERING CLAUSES

8. ACCORDINGLY, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission’s rules, Telephone & Two-Way Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of \$3,000 for willfully and repeatedly violating Section 1.2107(c) of the Commission’s rules.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission’s rules, 47 C.F.R. § 1.80, that within thirty (30) days of the release of this Notice, TTW SHALL PAY the full amount of the proposed forfeiture, or SHALL FILE a written response seeking reduction or cancellation of the proposed forfeiture.

10. Payment of the forfeiture may be made by mailing a check or similar instrument, payable

¹¹ See *Closing PN*, 16 FCC Rcd at 21857.

¹² The Commission has held that an act or omission is “willful” if it is a conscious and deliberate act or omission, whether or not there is any intent to violate the rule. *Southern California Broadcasting Company*, 6 FCC Rcd 4387 (1991). Furthermore, a continuing violation is “repeated” if it lasts more than one day. *Id.* at 4388.

¹³ 47 U.S.C. § 503(b)(1)(B).

¹⁴ *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission’s Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17114 (1997) (“*Forfeiture Policy Statement*”); *recon denied*, 15 FCC Rcd 303 (1999).

¹⁵ See e.g., *PCS Partners, L.P.*, 16 FCC Rcd 5547 (EB 2001) (forfeiture paid) (proposing a \$3,000 forfeiture against winning bidder that filed its long-form application four days late and its ownership report two days late because of administrative oversight); *PinPoint Communications, Inc.*, 14 FCC Rcd 6427 (PSPWD, WTB 1999) (proposing a \$3,000 forfeiture against winning bidder that filed its long-form application six days late because of administrative oversight).

to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment MUST INCLUDE the FCC Registration Number (FRN) referenced above and the NAL/Acct. No. referenced above.

11. The response, if any, must be mailed to Melanie A. Godschall, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-B443, Washington DC 20554 and MUST INCLUDE the NAL/Acct. No. referenced above.

12. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

13. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁶

14. Under the Small Business Paperwork Relief Act of 2002, Pub L. No. 107-198, 116 Stat. 729 (June 28, 2002), the FCC is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If you qualify as a small entity and if you wish to be treated as a small entity for tracking purposes, please so certify to us within thirty (30) days of this NAL, either in your response to the NAL or in a separate filing to be sent to the Federal Communications Commission, Enforcement Bureau, Investigations and Hearings Division. Your certification should indicate whether you, including your parent entity and its subsidiaries, meet one of the definitions set forth in the list provided by the FCC's Office of Communications Business Opportunities (OCBO) set forth in Attachment A of this Notice of Apparent Liability. This information will be used for tracking purposes only. Your response or failure to respond to this question will have no effect on your rights and responsibilities pursuant to Section 503(b) of the Communications Act. If you have questions regarding any of the information contained in Attachment A, please contact OCBO at (202) 418-0990.

15. IT IS FURTHER ORDERED that copies of this Notice shall be sent, by Certified Mail -- Return Receipt Requested, to Telephone & Two-Way Inc., Attn: Ron Lauber, 2827 Cynthia Dr., Medina, OH 44256; and to counsel for TTW, Dana D. Daberko, Esq., Shulman, Rogers, Gandal, Pordy & Ecker, P.A., 11921 Rockville Pike, 3rd floor, Rockville, MD 20852.

FEDERAL COMMUNICATIONS COMMISSION

Charles W. Kelley
Chief, Investigations and Hearings Division

¹⁶ See 47 C.F.R. § 1.1914.

Enforcement Bureau

October 2002

ATTACHMENT A

FCC List of Small Entities

As described below, a “small entity” may be a small organization, a small governmental jurisdiction, or a small business.

| (1) Small Organization | |
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| Any not-for-profit enterprise that is independently owned and operated and is not dominant in its field. | |
| (2) Small Governmental Jurisdiction | |
| Governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand. | |
| (3) Small Business | |
| Any business concern that is independently owned and operated and is not dominant in its field, <i>and</i> meets the pertinent size criterion described below. | |
| Industry Type | Description of Small Business Size Standards |
| <i>Cable Services or Systems</i> | |
| Cable Systems | Special Size Standard – Small Cable Company has 400,000 Subscribers Nationwide or Fewer |
| Cable and Other Program Distribution | \$12.5 Million in Annual Receipts or Less |
| Open Video Systems | |
| <i>Common Carrier Services and Related Entities</i> | |
| Wireline Carriers and Service providers | 1,500 Employees or Fewer |
| Local Exchange Carriers, Competitive Access Providers, Interexchange Carriers, Operator Service Providers, Payphone Providers, and Resellers | |

Note: With the exception of Cable Systems, all size standards are expressed in either millions of dollars or number of employees and are generally the average annual receipts or the average employment of a firm. Directions for calculating average annual receipts and average employment of a firm can be found in 13 CFR 121.104 and 13 CFR 121.106, respectively.

| International Services | |
|--|---|
| International Broadcast Stations | \$12.5 Million in Annual Receipts or Less |
| International Public Fixed Radio (Public and Control Stations) | |
| Fixed Satellite Transmit/Receive Earth Stations | |
| Fixed Satellite Very Small Aperture Terminal Systems | |
| Mobile Satellite Earth Stations | |
| Radio Determination Satellite Earth Stations | |
| Geostationary Space Stations | |
| Non-Geostationary Space Stations | |
| Direct Broadcast Satellites | |
| Home Satellite Dish Service | |
| Mass Media Services | |
| Television Services | \$12 Million in Annual Receipts or Less |
| Low Power Television Services and Television Translator Stations | |
| TV Auxiliary, Special Broadcast and Other Program Distribution Services | |
| Radio Services | \$6 Million in Annual Receipts or Less |
| Radio Auxiliary, Special Broadcast and Other Program Distribution Services | |
| Multipoint Distribution Service | Auction Special Size Standard – Small Business is less than \$40M in annual gross revenues for three preceding years |
| Wireless and Commercial Mobile Services | |
| Cellular Licensees | 1,500 Employees or Fewer |
| 220 MHz Radio Service – Phase I Licensees | |
| 220 MHz Radio Service – Phase II Licensees | Auction special size standard - Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and controlling principals) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and controlling principals) |
| 700 MHz Guard Band Licensees | |
| Private and Common Carrier Paging | |
| Broadband Personal Communications Services (Blocks A, B, D, and E) | 1,500 Employees or Fewer |
| Broadband Personal Communications Services (Block C) | Auction special size standard - Small Business is \$40M or less in annual gross revenues for three previous calendar years Very Small Business is average gross revenues of \$15M or less for the preceding three calendar years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) |
| Broadband Personal Communications Services (Block F) | |
| Narrowband Personal Communications Services | |
| Rural Radiotelephone Service | 1,500 Employees or Fewer |
| Air-Ground Radiotelephone Service | |

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| 800 MHz Specialized Mobile Radio | Auction special size standard - Small Business is \$15M or less average annual gross revenues for three preceding calendar years |
| 900 MHz Specialized Mobile Radio | |
| Private Land Mobile Radio | 1,500 Employees or Fewer |
| Amateur Radio Service | N/A |
| Aviation and Marine Radio Service | 1,500 Employees or Fewer |
| Fixed Microwave Services | |
| Public Safety Radio Services | Small Business is 1,500 employees or less Small Government Entities has population of less than 50,000 persons |
| Wireless Telephony and Paging and Messaging | 1,500 Employees or Fewer |
| Personal Radio Services | N/A |
| Offshore Radiotelephone Service | 1,500 Employees or Fewer |
| Wireless Communications Services | Small Business is \$40M or less average annual gross revenues for three preceding years Very Small Business is average gross revenues of \$15M or less for the preceding three years |
| 39 GHz Service | |
| Multipoint Distribution Service | Auction special size standard (1996) – Small Business is \$40M or less average annual gross revenues for three preceding calendar years Prior to Auction – Small Business has annual revenue of \$12.5M or less |
| Multichannel Multipoint Distribution Service | \$12.5 Million in Annual Receipts or Less |
| Instructional Television Fixed Service | |
| Local Multipoint Distribution Service | Auction special size standard (1998) – Small Business is \$40M or less average annual gross revenues for three preceding years Very Small Business is average gross revenues of \$15M or less for the preceding three years |
| 218-219 MHz Service | First Auction special size standard (1994) – Small Business is an entity that, together with its affiliates, has no more than a \$6M net worth and, after federal income taxes (excluding carryover losses) has no more than \$2M in annual profits each year for the previous two years New Standard – Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) |
| Satellite Master Antenna Television Systems | \$12.5 Million in Annual Receipts or Less |
| 24 GHz – Incumbent Licensees | 1,500 Employees or Fewer |
| 24 GHz – Future Licensees | Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and |

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| | persons or entities that hold interest in such entity and their affiliates) |
| Miscellaneous | |
| On-Line Information Services | \$18 Million in Annual Receipts or Less |
| Radio and Television Broadcasting and Wireless Communications Equipment Manufacturers | 750 Employees or Fewer |
| Audio and Video Equipment Manufacturers | |
| Telephone Apparatus Manufacturers (Except Cellular) | 1,000 Employees or Fewer |
| Medical Implant Device Manufacturers | 500 Employees or Fewer |
| Hospitals | \$29 Million in Annual Receipts or Less |
| Nursing Homes | \$11.5 Million in Annual Receipts or Less |
| Hotels and Motels | \$6 Million in Annual Receipts or Less |
| Tower Owners | (See Lessee's Type of Business) |